Amendments to Kenyan Competition Law Regime

1. On 13 December 2019, President Uhuru Kenyatta signed the Competition (Amendment) Bill, 2019 into law, which includes some notable amendments to the existing Competition Act. The primary purpose of the amendments is "to facilitate investigations with a view of mitigating abuse of bargaining power which adversely affects the economy, and empowers the Competition Authority to investigate and take action against such conduct." Many of the new provisions mirror the 2017 Buyer Power Guidelines published by the Competition Authority of Kenya (CAK) and are likely to be aimed at addressing the negative effects of the abuse of buyer power on the sustainability of suppliers, especially small and medium enterprises.

2. The Amendment Act enhances the prohibition against abuse of buyer power in a standalone section. This departs from the previous legislative position which dealt with abuse of buyer power as a sub-species of abuse of dominance.

3. The Competition (General) Rules, 2019 were also published in the Kenyan Gazette on 6 December 2019. The rules set out revised merger notification thresholds, filing fees and revised exclusions. Key developments are that (i) certain mergers no longer require any notification; and (ii) if a merger is notified to the COMESA Competition Commission, a national filing need not be made to the CAK, although the Kenyan authority must be informed. We understand that the CAK is applying the new rules.

Prohibition against the abuse of buyer power

4. The Amendment Act defines 'buyer power' as the influence exerted by an undertaking or group of undertakings, in the position of purchaser of a product or service, to obtain from a supplier more favourable contractual terms; or to impose a long term opportunity cost including harm or withheld benefit, which, if carried out, would be significantly disproportionate to any resulting long term cost to the undertaking or group of undertakings.

5. In order to ascertain whether such an abuse of power has occurred, the CAK is empowered to take into consideration various circumstances including, for example, the nature of contractual terms and the manner in which they were determined, the prices that are ultimately paid to suppliers, as well as any payments requested in order to secure access to infrastructure. In particular, the Amendment Act instructs that the CAK be guided by any existing agreements between purchasers and suppliers, and provides that such agreements must include terms of payment, a payment date, the interest rate payable on late payment, conditions for termination and variation of the contract on reasonable notice as well as a dispute resolution mechanism.

6. In providing guidance to the CAK, the Amendment Act lists the following examples of conduct which may amount to an abuse of buyer power:

(i) delays in paying suppliers without justifiable reason in breach of agreed terms of payment;
(ii) unilateral termination or threats of termination of a commercial relationship, without notice or on unreasonably short notice and without an objectively justifiable reason;

(iii) refusal to receive or return any goods or part thereof without justifiable reason in breach of the agreed contractual terms;

(iv) transfer of costs or risks to suppliers of goods or services by imposing a requirement for the suppliers to fund the cost of a promotion of goods or services;

(v) transfer of commercial risk (which is traditionally borne by the buyer) to suppliers;

(vi) demands for preferential terms unfavourable to the suppliers or demanding limitations on suppliers to other buyers;

(vii) reducing prices by "a small but significant amount" where there is difficulty in finding alternative buyers or reducing prices below competitive levels; and

(viii) bidding up prices of inputs by a buyer undertaking with the aim of excluding competitors from the market.

7. The Amendment Act grants the CAK various enforcement powers in order to ensure compliance with the new provisions. Significantly, the CAK may impose reporting and prudential requirements where it has established that a particular undertaking or sector is subject to, or is likely to become subject to, an abuse of buyer power. The CAK, in addition, may require that specific industries or sectors which are perceived to be more likely to become influenced by abuses of buyer power implement a binding code of practice.

8. In order to promote adherence to the new provisions on buyer power, the Amendment Act prescribes that the CAK must publish a general code of practice in consultation with relevant stakeholders, government agencies and the Attorney-General.

9. Any person found to have contravened the prohibition against the abuse of buyer power may be sentenced to imprisonment for up to five years and/or liable for a fine not exceeding ten million shillings.

Anti-competitive behaviour by professional associations

10. While the Principal Act provided for exemptions in respect of professional rules of a professional association, the Amendment Act introduces a new provision which states that any professional association whose rules contain a restriction which has the effect of preventing, distorting or lessening competition in a market in Kenya and which fails to apply for an exemption or does not abide by the CAK’s rejection of such application commits an offence. The official or person responsible for issuing such rules or guidelines in contravention of this provision may be sentenced to imprisonment for up to five years and/or may be liable to a fine not exceeding ten million shillings.

The Competition (General) Rules, 2019

11. The Rules provide clarity on certain transactions that do not require notification including:

(A) Restructurings and reorganisations within the same group are not notifiable – Rule 6 indicates, that amongst other transactions, a merger involving a holding company and its subsidiary wholly owned by undertakings belonging to the same group or amalgamations involving subsidiaries wholly owned by undertakings belonging to the same group shall not be subject to notification. In terms of the merger assessment guidelines, 2016, the CAK indicated that it regards an internal restructuring within a group of undertakings (where one undertaking already controls the other undertaking or the undertakings concerned are ultimately controlled by the same undertaking) as not constituting a merger. As such, the CAK may apply the exclusion to extend to subsidiaries that are not wholly owned, provided that ultimate control does not change.

(B) Extra-territorial mergers with no effect in Kenya – Rule 7 provides that a merger shall not be subject to notification if it is taking place wholly or entirely outside of Kenya and has no local connection.
(C) Mergers notified to COMESA – where previously Kenya required a national filing even if a filing was made to the COMESA Competition Commission (CCC), Rule 8 stipulates that where a merger meets the threshold prescribed under the COMESA Competition Regulations and Rules, the parties shall notify the CCC in the prescribed form, and inform the Authority (within 14 days) in writing regarding the notification.

12. In addition to a revised merger notification form, attached to the Rules are merger threshold guidelines. There appear to be a number of inconsistencies and gaps in the guidelines which do not make sense. It therefore remains to be seen how the CAK will interpret and implement the guidelines. Key guidelines are set out below:

Transactions subject to a merger notification

(A) where the undertakings have a minimum combined turnover or assets (whichever is higher) of KES1 billion and the turnover or assets (whichever is higher) of the target undertaking is above KES500 million;¹

(B) where the turnover or assets (whichever is higher) of the acquiring undertaking is above KES10 billion and the merging parties are in the same market or can be vertically integrated, unless the transaction meets the CCC merger notification thresholds in which case it would presumably be notified to the CCC and not the CAK;

(C) in the carbon based mineral sector, if the value of the reserves, the rights and the associated assets to be held as a result of the merger exceeds KES10 billion;

(D) where the undertakings operate in COMESA, combined turnover or assets (whichever is higher) of the merging parties does not exceed KES500 million and two-thirds or more of their turnover or assets (whichever is higher) is generated or located in Kenya. It appears that there may be a typographical in the guidelines and that the reference should be to instances in which the combined turnover or assets (whichever is higher) of the merging parties exceed KES500 million.

Transactions excluded from notification but which require approval i.e. a full merger notification is not required but an exclusion application is required

(A) where the combined turnover or assets (whichever is higher) of the merging parties is between KES500 million and KES1 billion;

(B) if the firms are engaged in prospecting in the carbon-based mineral sector, irrespective of asset value.

Transactions excluded from notifications which do not require approval i.e. no merger notification or exclusion application is required

(A) the combined turnover or assets (whichever is higher) of the merging parties does not exceed KES500 million shillings; or

(B) the merger meets the CCC merger notification threshold and at least two-thirds of the turnover or assets (whichever is higher) is not generated or located in Kenya.

Revised filing fees

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<tr>
<th>Thresholds (combined value of assets/turnover KES)</th>
<th>Fees (KES)</th>
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<tr>
<td>0 – 500 million</td>
<td>0 (excluded from notification)</td>
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<tr>
<td>500,000,001 – 1 billion</td>
<td>(excluded transactions requiring approval)</td>
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<td>1,000,000,001 – 10 billion</td>
<td>1 million</td>
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<tr>
<td>10, 000, 000, 001 – 50 billion</td>
<td>2 million</td>
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<td>Above 50 billion</td>
<td>4 million</td>
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¹ KES1 is approximately USD0.01 (as at 5 February 2020).